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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

GEORGE NELSON, Plaintiff and Appellant, v. WELLS FARGO BANK, N.A., Defendant and Respondent.	B229120 (Los Angeles County Super. Ct. No. BC387234)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mary Ann Murphy, Judge. Affirmed.

John E. Sweeney & Associates, John E. Sweeney, Robert N. Pafundi for Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton, Eric J. Troutman for Defendant and Respondent.

After duping a lender into funding his purchase of real property—by using another person's name and good credit—George Nelson now complains that the loan servicing agent did not properly credit his payments on the loan. The problem is that the lender *has never had* a contractual relationship with Nelson. As a result, notices regarding the loan were sent to the named borrower, not to Nelson, and the loan servicing agent refused to discuss the loan with Nelson because his name is not on the promissory note nor on the deed of trust.

Nelson's claims are barred by res judicata, in any event. After Nelson filed a bankruptcy petition in 2010, the mortgagee asserted a claim. In response, Nelson objected that his payments on the loan were not properly credited by the servicing agent. Nelson and the lender settled their dispute in the bankruptcy court. Nelson is estopped from relitigating whether his loan payments were mishandled: this matter was raised in the bankruptcy court, and was (or should have been) resolved there.

FACTS[1]

In 1999, Nelson leased a home on Lockhurst Drive in Woodland Hills (the Property). The lease contained an option to purchase the Property. Nelson's then-fiancée Paula Koerner obtained a loan for $384,000 to purchase the Property. Koerner is the sole "borrower" named in the deed of trust securing the promissory note. Koerner's purchase of the Property was originally funded by GreenPoint Mortgage Funding. In September 2002, GreenPoint sold the note and trust deed on the Property to EMC Mortgage

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1 The facts are taken from appellant's fifth amended complaint. At the parties' request, we take judicial notice of publicly recorded documents and documents filed in appellant's voluntary bankruptcy proceeding. (Evid. Code, § 452, subd. (h); *Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 549 [judicial notice of publicly recorded deeds; *Bunch v. Hoffinger Industries, Inc.* (2004) 123 Cal.App.4th 1278, 1290, fn. 3 [judicial notice of bankruptcy court proceedings]

Corporation.[2] Respondent Wells Fargo Bank was the loan servicing agent for the Lender.

The prior owner of the Property deeded title to Koerner. In turn, Koerner executed a grant deed transferring title to the Property to Nelson, on July 23, 2001. The second grant deed (from Koerner to Nelson) was recorded in May 2002. There is no allegation or documentation showing that the Lender ever agreed to have Nelson assume the loan and become the "borrower." On its face, Koerner's deed of trust requires the Lender's written approval prior to any transfer of title by Koerner.

In September 2002, Nelson and Koerner had a falling out and ended their marital engagement. One month later, Nelson called the Lender to say that he, not Koerner, owns the Property. Koerner advised the Lender that she was tricked into signing the deed transferring title to Nelson, or that her signature was forged. Koerner brought an action to quiet title to the Property. Nelson prevailed in the action, and in April 2003, a court found that Koerner has no financial interest in the Property.

In 2005, Nelson notified the Lender about his success in the action to quiet title: the Lender received the July 2001 grant deed and the 2003 court order quieting title in favor of Nelson. At the same time, Nelson's mortgage payment was lost, and the Lender worked with Nelson to resolve the problem. After the problem was resolved, Nelson continued to make mortgage payments.

In November 2005, Wells Fargo began servicing the loan. It received files and records disclosing that Nelson made the mortgage payments on the Property; that he had in the past resolved delinquencies directly with the Lender; and that the quiet title action was resolved in his favor. Though Nelson made mortgage payments on the property from November 2005 until October 2006, Wells Fargo delayed negotiation of the checks. Nelson sent his payments by express mail or Western Union, so he has proof that his payments were timely.

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[2] GreenPoint Mortgage Funding and EMC Mortgage Corp. (the Lender) are not parties to this appeal, nor is Koerner.

Wells Fargo initiated foreclosure proceedings and notified the borrower, Koerner, that the loan was in arrears and was being accelerated. Koerner told Wells Fargo that she did not want a loan modification; rather, she invited a foreclosure. She suggested that Nelson was a "tenant" whose failure to pay "rent" caused the loan to go into default.

Nelson tried to ensure that his payments were being received, processed and credited to Koerner's loan. Wells Fargo did not acknowledge Nelson's letters and refused to speak with him on the telephone, but all of his payments were cashed. Nelson learned that the Property was in foreclosure in October 2006. No notice of default was sent to Nelson. To stop the foreclosure, Nelson sent a cashier's check to Wells Fargo, thus making duplicate payments. He has mail receipts for payments made from November 2006 to July 2007, which were cashed by Wells Fargo.

Nelson's February 2007 payment was inexplicably received by Bank of America. When Nelson attempted to determine what had happened, Wells Fargo refused to speak to him. He sent a replacement check. In July 2007, Wells Fargo indicated that the loan was in default and threatened foreclosure if $12,519.97 was not received by August 22, 2007. Again, Nelson sent a cashier's check, even though it was a duplicate payment.

In January 2008, Koerner asked Wells Fargo to put the Property into foreclosure because her "tenant" was not paying the "rent." In February 2008, Wells Fargo sent a letter indicating that the loan was in default, and threatening foreclosure if it did not receive $9,184.84 by March 2008. Once again, Nelson made duplicate payments and sent a cashier's check for the claimed delinquency.

Nelson resumed his payments in March 2008 until August 2008. His June payment, which was sent express mail to a post office box that Wells Fargo had used for more than two years, was placed by the post office in a "dead letter" repository for two months before it was return to Nelson. As a result, Wells Fargo again placed the loan in default. It sent a letter to Koerner indicating that the amount of default was $11,474.79, and threatened to accelerate the loan if payment was not received by August 19, 2008. Nelson was forced to make this payment to prevent foreclosure.

Nelson was prevented from refinancing the Property in his own name: Wells Fargo stigmatized Nelson's payment record after he was declared to be the owner of the Property in the quiet title action. Starting in August 2005, Nelson pursued a refinance of the loan on the Property, but Wells Fargo refused to supply payoff information. Nelson seeks to recover the alleged duplicate payments he made in October 2006, July 2007, March 2008 and August 2008. He also seeks injunctive relief to prevent Wells Fargo from misapplying his payments or placing the loan in default. Nelson asserts claims for unfair business practices; an accounting; interference with prospective economic advantage; and for money had and received.

THE TRIAL COURT'S RULING

Wells Fargo filed multiple demurrers, and the trial court repeatedly gave Nelson leave to amend. On October 29, 2010, the court sustained demurrers to Nelson's fifth amended complaint without leave to amend, and dismissed his action. The court wrote, "Plaintiff lacks standing to sue the bank on a mortgage to which he is not a party. Wells Fargo had no duty to make an accounting to plaintiff Nelson regarding Ms. Koerner's mortgage, as plaintiff Nelson is not a party to the contract." Based on Nelson's lack of standing, none of his claims survived demurrer. Nelson filed a timely appeal from the dismissal of his case.

NELSON'S BANKRUPTCY

On December 14, 2010, Nelson filed a Chapter 13 voluntary bankruptcy petition. Nelson listed liabilities against the Property totaling $861,000.[3] The Lender (through its servicing agent) submitted a bankruptcy claim asserting that Nelson was $60,125 in arrears on the loan. Nelson objected to the claim on the grounds that (1) the Lender overstates the amount due on the note by $1,000 every month, and (2) Nelson made all of the payments, but Wells Fargo did not properly credit the account.

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[3] Nelson lists a debt to Wells Fargo of $382,000, plus a second deed of trust on the Property for $400,000 (from a private individual), as well as a judgment lien for $79,000.

The Lender replied that the loan carries impound fees, so the monthly payment includes principal and interest ($2,884), property taxes ($738), and hazard insurance ($186), totaling $3,810 per month, i.e., $1,000 more per month than Nelson paid. His failure to pay the impound fees created the delinquency. Further, Nelson sent his loan payments to the wrong address: the borrower of record, Paula Koerner, was notified of the loan servicer's change of address but Nelson was not notified because the Lender has no contract with Nelson, and never agreed to transfer the note from Koerner to Nelson. As a result, Nelson's payments were misaddressed and were not credited.

Nelson objected that he was unaware of the impound fees, because the Lender failed to provide him with a payment history ledger. He claimed entitlement to the payment history ledger as the legal and equitable owner of the Property. He contested the necessity of the Lender paying property taxes and hazard insurance on the Property through an impound account.

In September 2011, Nelson and the Lender stipulated to resolve their dispute. Nelson agreed that his arrearage on the loan is $64,854.50, and he withdrew his objection to the Lender's claim. The agreement reads, in a handwritten recital, "This stipulation and resulting orders are not intended to extend to issues raised by Debtor in the action Nelson v. Wells Fargo case no. B229120 2nd App. Dist; LA Superior Court case no: BC387234." The bankruptcy court entered an order on the parties' stipulation on September 22, 2011.

DISCUSSION

We invited supplemental briefing on the issue of Nelson's bankruptcy petition, and the effect of the bankruptcy court's order on this appeal. (Gov. Code, § 68081.) Wells Fargo argues that the bankruptcy court order is a final judgment that has a res judicata effect barring Nelson's claims in this lawsuit. Nelson responds that the bankruptcy order does not meet the requirements for the application of res judicata.

Res judicata precludes a party from relitigating issues "that were or could have been raised" in a prior proceeding. (*Rein v. Providian Financial Corp.* (9th Cir. 2001) 270 F.3d 895, 898.) A bankruptcy judgment may bar a related lawsuit if (1) there is a

final judgment on the merits in a court of competent jurisdiction; (2) the same claim or cause of action is at issue in both cases; and (3) the parties are identical or in privity. (*Id.* at p. 899.) Two lawsuits involve the same cause of action if they share "'the same nucleus of operative facts'" so that the asserted claims "could have been effectively litigated" in the first suit. (*Matter of Baudoin* (5th Cir. 1993) 981 F.2d 736, 743.)

"A judicially approved settlement [in bankruptcy court] is considered a final judgment on the merits," for res judicata purposes. (*Rein v. Providian Financial Corp.*, *supra*, 270 F.3d at p. 903.) The party asserting res judicata has the burden of showing that the subsequent action is precluded, following the bankruptcy judgment. (*Id.* at p. 899, fn. 3.) If a federal judgment is preclusive in federal court, it is also preclusive in the California state courts, following the doctrine of full faith and credit. (*Nathanson v. Hecker* (2002) 99 Cal.App.4th 1158, 1163.)

Nelson's bankruptcy claim and this lawsuit involve the same nucleus of operative facts. "In general, garden variety lender liability claims alleging wrongful lending or collections practices arise out of the same transaction as the lenders' cause of action[ ] to collect on the loans." (*Sanders v. First Nat. Bank in Great Bend* (M.D. Tenn. 1990) 114 B.R. 507, 513; *Rein v. Providian Financial Corp.*, *supra*, 270 F.3d at p. 903.) A bankruptcy debtor who negotiates an agreement with his lender—after the lender files a claim in the bankruptcy proceeding—cannot subsequently sue the lender for wrongful business practices or for charging a usurious rate on the loan. (*Matter of Howe* (5th Cir. 1990) 913 F.2d 1138, 1140-1141, 1143-1147; *Sure-Snap Corp. v. State Street Bank and Trust Co.* (2d Cir. 1991) 948 F.2d 869, 872-875.) "'[T]he loan transaction at the heart of the present litigation was also the source of [the bank's] claim against the [bankruptcy] estate.' [Citation.] As such . . . the lender liability claims [made by the debtor were] the 'same' as the bankruptcies, for purposes of *res judicata*." (*Matter of Baudoin*, *supra*, 981 F.2d at p. 744.)

A bankruptcy proceeding encompasses the entire debtor-creditor relationship, including any alleged wrongdoing by a bank with respect to the debtor's loan, which induced the debtor to file the bankruptcy petition. (*Sure-Snap Corp. v. State Street Bank*

and Trust Co., supra, 948 F.2d at p. 875.) If the bank's alleged misconduct negatively impacts a debtor's financial status, then the bankruptcy plan and the lender liability claims "comprise the same essential matter." (*Ibid.*; *Matter of Baudoin, supra*, 981 F.2d at p. 744.) For example, if a lender makes a claim in the debtor's bankruptcy, and the debtor fails to object to the validity and amount of the lender's claim, the debtor is barred from later pursuing the lender for improper interest rate adjustments "[b]ecause it had the opportunity to contest the claim before the bankruptcy court" and thus the claim was barred by res judicata. (*D & K Properties Crystal Lake v. Mutual Life Ins.* (7th Cir. 1997) 112 F.3d 257, 262, fn. 4.)

In this case, the Lender submitted a claim to the bankruptcy court, asserting that Nelson was $60,125 in default. Nelson objected to the Lender's claim, arguing (1) the Lender overstated the monthly payment due and (2) Wells Fargo failed to properly credit his payments. In his objection, Nelson asserted that he "repeatedly requested account information from EMC Mortgage and/or Wells Fargo Mortgage. Creditor EMC Mortgage and Wells Fargo Mortgage refused and failed to provide said information."

The dispute over the Lender's claim was resolved by stipulation. Nelson *agreed* that he owes the Lender arrearages of $64,854.50, and he *withdrew* his objection to the Lender's claim. The stipulation operates as a concession that Nelson underpaid—apparently due to his unawareness that the monthly loan payment was supposed to include another $1,000 for insurance and property taxes. Nelson withdrew his objection regarding the conduct of Wells Fargo, although the matter was properly before the bankruptcy court to show that Nelson owed less because Wells Fargo allegedly increased his late fees and duplicated his outlays by mishandling his payments.

The doctrine of res judicata "bars claims that *should have been litigated* in a previous proceeding." (*In re Intelogic Trace, Inc.* (5th Cir. 2000) 200 F.3d 382, 388, italics added.) "Once a bankruptcy plan is confirmed, it is binding on all parties and all questions that could have been raised pertaining to the plan are entitled to *res judicata* effect." (*Trulis v. Barton* (9th Cir. 1995) 107 F.3d 685, 691.) Nelson's defense against the Lender's claim—that his loan payments were mishandled—should have been

resolved in the bankruptcy court. He certainly raised that defense in his objection to the Lender's claim. He cannot pursue his claim now, after conceding to a $64,854 loan payment deficiency in bankruptcy court. The true amount owing on the loan—late fees and duplicative payments included—is a settled matter.

Nelson acknowledges in his letter brief that "Wells Fargo and EMC may be in privity with respect to the loan underlying this action . . . ." Wells Fargo is the loan servicer for EMC. "[A] loan servicer acts only as the agent of the owner of the instrument." (*In re Fontes* (9th Cir. 2011) 2011 WL 3300933.) The loan servicer is in privity with the owner of the loan instrument. (*Lettenmaier v. Federal Home Loan Mortg. Corp.* (D.Or. 2011) 2011 WL 3476648; *Arias v. Superior Court* (2009) 46 Cal.4th 969, 986 [collateral estoppel applies not just to parties to the prior action, but also to those for whom a party acted as an agent or proxy].)

Nelson's claims against Wells Fargo arise from its acts as the Lender's agent. The bankruptcy court resolution of the Lender's claim equally resolved the matter of Nelson's claims against the Lender's agent for the alleged mishandling of Nelson's loan payments. Even if (as Nelson claims) Wells Fargo at one point owned the loan, and was not merely the servicer, EMC's and Wells Fargo's successive relationship to the same property and to the same loan establishes privity as owners of the lien or assignees. (*Taylor v. Sturgell* (2008) 553 U.S. 880, 894; *Lowell Staats Min. Co. v. Philadelphia Elec. Co.* (10th Cir. 1989) 878 F.2d 1271, 1275; *Kawa v. United Sates* (2007) 77 Fed. Cl. 294, 308.)

Within the bankruptcy order is the handwritten recital stating that the order is "not intended to extend to issues raised by Debtor" in this appeal. This recital is unavailing. One court cannot dictate whether its judgment has preclusive consequences in a subsequent court proceeding. (*Smith v. Bayer Corp.* (2011) ___ U.S. ___, ___ [131 Sup.Ct. 2368, 2375]; *Midway Motor Lodge v. Innkeepers' Telemgmt.& Equip.* (7th Cir. 1995) 54 F.3d 406, 409; *Covanta Onondaga Ltd. v. Onondaga County Resource* (2d Cir. 2003) 318 F.3d 392, 397-398.) "[C]an a federal court grant a declaration precluding a second court from applying the doctrines of claim or issue preclusion? The answer is 'no.' It is well-established that in federal courts the court rendering the first judgment

does not have the power to determine that judgment's effect; the second court is entitled to make its own decision." (*Gagliardi v. American Home Products Corp.* (E.D.Wis. 1998) 29 F.Supp.2d 972, 974.)

Finally, Nelson observes that this lawsuit was filed before he filed for bankruptcy. It does not matter which case was filed first. "[A] judgment in a later-filed action can act as res judicata to bar an earlier-filed action." (*United States v. Liquidators of European Federal Credit Bank* (9th Cir. 2011) 630 F.3d 1139, 1152, fn. 8.) When two actions based on the same claim are pending concurrently, the one decided first becomes conclusive, regardless of which lawsuit was filed first. (*Ellis v. Amex Life Ins. Co.* (5th Cir. 2000) 211 F.3d 935, 937-938.) If anything, this 2008 lawsuit shows that Nelson knew full well that he supposedly overpaid on the loan *before* he stipulated to a $64,854 deficiency payment in bankruptcy court in 2011. Nelson would never have agreed to fork out such a huge deficiency if he really believed that he made multiple duplicate payments on the loan in the past, thereby overpaying the Lender.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.